IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Arb. Case No. 26 of 2003.

Judgement reserved on: 23.7.2007.

Date of decision: 1.8.2007.

Union of India (Bharat Sanchar Nigam Ltd.) ….. Petitioner/ objector.

Vs.

M/s Lali Construction Company …. Respondent/non-objector/ Claimant.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the petitioner-objector: **Mr. Sandeep Sharma, Assistant Solicitor General of India with Mr. Janesh Mahajan, Central Govt. Counsel.**

For the Respondent/non-Objector/ claimant : **Mr. J.S.Bhogal, Senior Advocate with Mr. Suneet Goel, Advocate.**

Kuldip Singh, Judge.

These objections, under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the Act) are filed by petitioner-objector against the award, dated 29.1.2003, passed by Sh. A.K.Nayak, sole Arbitrator. M/s Lali Construction Company is referred hereinafter as claimant and Union of India/ Bharat Sanchar Nigam as objector.

Whether the reporters of the local papers may be allowed to see the Judgment?

2. The brief facts of the case are that the claimant in agreement No. 19/EE/TCD/MND/95-96, was awarded contract for construction of Telecomm Training Centre at Sundernagar, District Mandi, for Rs.1,79,97,007/-. The date of start of work was 8.3.1996 and due date of completion was 7.9.1998, thus period for completion of work was 30 months. But work was actually completed on 6.8.1999. The claimant presented final bill which was paid on 18.1.2000. A dispute had arisen between the claimant and the objector, and, therefore, claimant invoked arbitration clause under the agreement for appointment of Arbitrator on 28.3.2000 and accordingly an Arbitrator was appointed to adjudicate the dispute. The claimant put up as many as 15 claims before the Arbitrator, but in the objection petition the objector has assailed award pertaining to claims No. 10, 13 and 14(a) only, which are as follows:-

Claim No. 10:	Losses and damages suffered due to abnormal prolongation of the contract period.	=Rs.6,00,000/-
Claim No. 13:	Underpayment for reimburse -ment of escalation payment in terms of 10CC of the agreement.	=Rs.4,25,000/-
Claim No. 14:	Interest on all claims as admissible under the provisions of Section 31 of the Arbitration and Conciliation Act, 1996 (Pre-suit, pendente-lite and future)	=@24% per annum (matter of calculation).
	(Claim No. 14 (a) allowed by the Arbitrator is part of Claim No. 14).	

3. The case of the claimant is that the claimant was required to complete the work within thirty months. The objector was

required to meet the core obligations within reasonable time, which would enable the claimant to meet the stipulated date. These fundamental obligations on the part of the objector included timely supply of structural drawings and designs, proper planning for giving detailed informations and decisions at the appropriate time, proper coordination and sanction of rates for additional works/ extra items within reasonable period.

4. The claimant has alleged that at the instance of objector the claimant had mobilized labour, personnel and machinery, and remained in a state of preparedness to achieve required progress in each month for completion of the work within the agreed time period. On account of defaults and lapses of the objector , the execution period got prolonged by 11 months beyond stipulated date of completion and this caused additional financial burden and losses on various counts, for which the claimant claimed compensation.

5. The objector denied claims on account of prolongation of work with the plea that delay was entirely attributable to the claimant and extension of time for delay was granted without levy of any compensation and payment for increase in cost of material and labour was made under Clause 10 CC.

6. The Arbitrator made the award on 29.1.2003. The Arbitrator has awarded Rs. 4,74,964/- under claim No. 10, Rs. 4,25,000/- under Claim No. 13 and under claim No. 14(a) interest at the rate of 18% per annum on the amount awarded against claims No. 2, 5, 7, 8, 9, i.e, on sum of Rs. 1,56,422/- from 6.2.2000 to 27.3.2000, as pre-suit interest.

7. The award has been assailed by objector by filing objections under Section 34 of the Act, on the grounds that award is against the public policy of India. The delay for completion of the work was attributable to the claimant and therefore, claimant is not entitled to any damages. The Arbitrator has erred in awarding Rs. 4, 25,000/-, against claim No. 13 under Clause 10-CC of the agreement. The claim No. 13, is illegal and erroneous. It has been alleged that this claim does not fall within the scope of arbitration. The award is a duplication of awarding damages. The price index is not the basis for working out the amount under Clause 10-CC. The Arbitrator has erred in splitting up claim No. 10. The Section 73 of the Contract Act was not adhered. The pre-suit interest under claim No. 14(a) is not tenable.

8. The claimant contested the objections and has filed reply and took preliminary objections that the objections do not disclose any legal ground, under Section 34 of the Act, for setting aside the award. The delay in execution of the work was not attributable to the claimant. It was denied that claim under clause 10-CC was erroneous. It was denied that award suffers from any illegality. It was denied that award is a duplication of damages. No objection was taken by objector before the Arbitrator regarding the jurisdiction of the Arbitral Tribunal to decide matters referred for arbitration. The claims have not been split up by the Arbitrator. It was denied that Arbitral Tribunal has not adhered to Section 73 of the Contract Act. The Arbitral Tribunal did not travel beyond the reference. The objector is estopped from raising the objections. The

interest has been awarded by the Arbitrator in accordance with the Act.

9. The following issues were framed from the pleadings of the parties:-

1. Whether the award made by the Arbitrator is dehors the contract agreement? OPO.

2. Whether the impugned award is in conflict with the Public Policy of India? OPO.

3. Relief.

10. The parties led their evidence by way of affidavits. I have heard the learned counsel for the parties and have also gone through the record.

Issues No. 1, 2 and 3:

11. All the issues are interconnected and are thus being decided collectively.

12. It has been submitted on behalf of the objector that the award is beyond the scope of the arbitration agreement and the reference. The delay in completion of the work is attributable to the claimant and not to the department. The claimant has not proved loss, damage under Claim No. 10. In any case Rs. 4,74,964/- awarded by the Arbitrator to claimant, under Claim No. 10, is excessive. The claimant is not entitled to any amount, under clause-10-CC of the agreement against Claim No.13. The Arbitrator has completely misconstrued, misinterpreted Clauses 5 and 10 of the agreement. The interest has been awarded under Claim No. 14 on

the higher side. The award is against the public policy of India and is not supported by reasons. The claimant has supported the award under Claims No. 10, 13 and 14. It has been submitted that the Arbitrator has given reasons in support of the award. No case has been made out by the department for questioning the amounts awarded under Claims No. 10, 13 and 14. This court is not sitting in appeal against the impugned award. The prolongation of completion of work was entirely attributable to the department.

13. The Arbitrator has examined the hindrance register, site order book, drawing register, correspondence relating to instructions about additional works and their fixation of rates, records about interferences by other agencies and other documents maintained and produced by the objector. The building was having superior architecture with sloped RCC roof and arch and also special type of finishing. In view of structure of the building the department took time for finalization of design and drawings and those were made available to the claimant in piecemeal. This affected the progress of the work. More than one and half years time was taken to finalize the roof slab, design and drawings. The claimant informed the department from time to time for supply of drawings through letters. The Arbitrator on the basis of material on record has come to specific finding that the department awarded the work to the claimant without making structural design ready which caused prolongation of the work. The department went on changing the specifications and taking fresh decisions for finishing various items just before the expiry of original stipulated period for completion of the work. There was delay in

finalization of the additional work of extra items. The payments of the claimant were not settled and paid in time by the department. On the basis of the material on record, the Arbitrator has recorded a finding that period of completion was prolonged due to the defaults and lapses attributable to the department. The extensions were granted by the Superintending Engineer without levy of compensation, which proves that delay was not on the part of the claimant. The department has committed fundamental breach of contract, which resulted prolongation of the work.

14. The learned counsel for the objector has not pointed out any document, which has been misconstrued, misinterpreted by the Arbitrator for returning the finding that delay was attributable to the department. The Arbitrator has given reasons in support of his conclusion that the delay for completion of the work was due to the defaults of the department and not of the claimant. This court is not sitting in appeal to appreciate the correctness of conclusion drawn by the Arbitrator from the material on record. The objector has failed to make out any case that delay was not attributable to the department and therefore, the contention of the objector that the delay was not attributable to the department is rejected.

15. The Arbitrator has considered Claim No.10 under following three sub-heads:-

(i) Sub-claim No. A (i): Rs. 1,65,000/- on account of idle staff at site @ Rs.15,000/- per month for 11 months.

(ii) Sub-claim No. A(ii) Rs. 1,10,000/- on account of depreciation on idle T&P, machinery, centering and shuttering materials.

(iii)Sub-claim No.B Rs. 3,29,945/- on account of reduced profitability.

16. The Arbitrator has awarded Rs. 1,65,000/- against sub-claim No. A (i), Rs. 1,10,000/- against sub-claim No. A (ii) and Rs. 1,99,964/- against sub-claim No. B. Thus as against total claim of Rs. 6,00,000/- under claim No. 10, the Arbitrator has awarded Rs. 1,65,000 + Rs. 1,10,000/- + Rs. 1,99,964/- = Rs. 4,74,964/-, in all to the claimant.

17. The delay for completion of the work was caused due to the defaults of the department. The claimant had to continue with his establishment till the work was completed on 6.8.1999. The claimant under clause 36 of the agreement was required to maintain certain technical staff till the work could be completed. The claimant was required to keep departmental materials under safe custody. The construction material and machinery required watch and ward. The claimant was required to keep some minimum staff. The claimant was forced to bear establishment expenses during the prolongation of the completion of the work. The Arbitrator has recorded a finding that Rs. 15,000/- per month claimed by the contractor for skeleton staff is reasonable. Learned counsel for objector has admitted that the Arbitrator himself is an Engineer. The prolongation period was of 11 months, the Arbitrator has given reasons in support of his conclusion while allowing compensation at the rate of Rs. 15,000/- for 11 months to the claimant under sub-claim A(i) of claim No. 10. In my opinion, the amount awarded by the Arbitrator to the claimant is reasonable

and is based upon material on record. It does not require any interference.

18. In considering sub-claim No. A (ii) of claimant, the Arbitrator has awarded Rs. 1,10,000/- on account of depreciation on idle T & P machinery, centering and shuttering materials. The Arbitrator has observed that idle time cannot be quantified, but had to be visualized from trade practice and common sense. He has considered that in the facts and circumstances of the case 2% of the prime cost of work done during the period of prolongation shall be reasonable assessment of damage. The Arbitrator has considered **Hudson's** "*Building and Engineering Contracts*". The Arbitrator has recorded a finding that gross value of work done and paid during the extended period amounts to Rs. 95,14,026/-. The prime cost assuming an element of 10% each for overheads and profits comes to Rs. 95,14,026 x 100/120 = Rs. 79,28,355/-. According to the Arbitrator, the amount claimed by the claimant- contractor under sub-claim No. A (ii) works out to 1.4% of the prime cost of work done in the period of prolongation. The basis of calculation made by the Arbitrator have not been specifically assailed. In my opinion, amount awarded by the Arbitrator under sub-claim A (ii) is just and does not require any interference.

19. The claimant under sub-claim- B, has claimed Rs. 3,29,945/- on account of reduced profitability due to prolongation of work. The Arbitrator on the basis of material on record has recorded a finding that against the tendered value of work amounting to Rs. 1,79,97,007/-, only work amounting

to Rs. 84,82,981/- could be done during the contract period which constitutes 47% of the contractual amount. The claimant could not complete the work due to defaults committed by the department. It is implicit in a work contract that contractor would earn some profit when the work is completed within the stipulated time period. In case there is prolongation of the completion of work due to the faults of the department, then contractor is to be compensated by way of damages and 10% to 15% profit is reasonable profit and contractor is justified to earn 10% to 15% profit from work contract.

20. On the basis of material on record, the Arbitrator has held that claimant has suffered loss of profit with no return from the work and has allowed loss of profit for four months out of 30 months period and ultimately for loss of profit at the rate of 10% for the pro-rata period of four months out of 30 months an amount of Rs. 1,99,964/- was allowed in favour of claimant. The details of calculations for calculating the amount of Rs. 1,99,964/- are given in the award. The Arbitrator has given reasons in support of sub-claim –B of Claim No. 10. The formula adopted by the Arbitrator for awarding Rs. 1,99,964/- under sub-claim –B of Claim No. 10 has not been assailed by the department. This part of the award is reasonable and I find no reason to set-aside the same.

21. It has been submitted that claimant is not entitled to Claim No. 13, in view of payment of compensation for escalation made under clause 10CC of the agreement. It has been submitted that clause 10CC of the agreement provides for compensation due to increase or decrease in cost of material and labour. The counsel for

the objector has relied Clause-5 of the agreement, which is as follows:-

> "If the contractor shall desire an extension of time for completion of the work on the grounds of his having been unavoidably hindered in its execution or on any other ground he shall apply in writing to the Engineer-in-Charge within 30 days of the date of hindrance on account of which he desires such extension as aforesaid, and the Engineer-in-Charge shall if in his opinion (which shall be final) reasonable grounds be shown therefor authorize such extension of time if any as may in his opinion be necessary or proper."

22. The learned Senior counsel representing the claimant has submitted that escalation formula provided in clause 10CC will be applicable during the original contract period and not after the expiry of original stipulated period for completion of work. He has supported the reasons given by the Arbitrator while discussing Claim No. 13. The contention of the learned Senior counsel is that after the expiry of original stipulated period of contract, the claimant is entitled for escalation payment at market rate and not on the basis of formula mentioned in clause 10CC. The submission of the department is that claimant has already been compensated under the contract by paying escalation, as per formula in clause 10CC of the agreement. The learned Senior Counsel for the claimant in order to support his contention has relied **M/s Metro Electric Co. New Delhi vs. Delhi Development Authority, New Delhi** [AIR 1980 DELHI 266]. In para-10 of the judgement, it has been held, as follows:-

"The present case is a case of the total failure of the D.D.A. in completing the civil construction, which was pre-condition for any electric installations to be made by the contractor. This is not a case of minor hindrance of impediments which alone are taken care of by Cl. 5. Even otherwise several representations made by the contractor regarding the delay in handing over of the site, had not produced any result. Secondly, even assuming that Cl. 5 is applicable in the present case that would not stand in the contractor's way in claiming damages, as Cl. 5 does not bar any such claim, either expressly or by implication. Hudson's Building and Engineering Contracts (Page 492, 9th Edition) states the principle as follows:-

`Where the cause of delay is due to breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of the clearest possible language, deprive the contractor of his right to damages for the breach.'

23. Clause 10C in **M/s Metro's case (supra)** was, as follows:-

"If during the progress of the works, the price of any material incorporated in the works (not being a material supplied from the Engineer-in-Charge store in accordance with Cl. 10 hereof) and/ or wages of labour increases as direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any changes in sales tax) and such increase exceed ten per cent of the price and/or wages prevailing at the time of acceptance of the tender for the work, and contract or thereupon necessarily and properly pays in respect of the material (incorporated in the work) such increased price

> and /or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied provided always that any increase so payable is not, in the opinion of the Chief Engineer (whose decision shall be final and binding) attribution to delay in the execution of the contract within the control of the contractor."

24. In the present case, clause 10CC is not similar to that of clause 10C, which was considered in **M/s Metro's case (supra).** The relevant part of clause 10CC in the present case, is reproduced hereinbelow:-

> "If the prices of materials (not being materials supplied or services rendered at fixed price by the department in accordance with Clause 10 and 34 hereof) and/ or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contractor shall accordingly be valid, subject to the condition that is compensation for escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the contract is validity extended under the provisions of clause 5 of the contract without any actions under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less…."

25. The perusal of clause 10CC would show that compensation under clause 10 CC would be payable during the original stipulated period of contract including such period for which the contract was validly extended under clause 5 without any actions

under clause (2). It is common case of the parties that original stipulated period for completion of work was extended from time to time up to 6.8.1999, when the work was actually completed. The department did not invoke clause (2) of the agreement while granting extension. The extension has been granted under clause 5 of the agreement. The clause 10 CC in the present case and clause 10 C in **M/s Metro's case (supra)** are not similar, therefore, the ratio of the case cited is not applicable to the case in hand.

26. Now the question is justification for awarding Rs. 4,25,000/- under Claim No. 13 by the Arbitrator. The Arbitrator has recorded a finding that clause 10CC would apply during the stipulated contract period and thereafter the claimant- contractor is entitled for escalation payment at market rate beyond the expiry of contract period and the Arbitrator has then worked out Rs. 4,25,000/- and awarded this amount to the claimant under claim No. 13. This finding is contrary to clause 10CC read with clause 5 of the agreement. The Arbitrator has totally misconstrued clause 10CC of the agreement. The findings recorded by the Arbitrator for awarding amount under Claim No. 13, are against the agreed terms of agreement between the parties, therefore, such findings are in conflict with public policy of India and are covered by Section 34 of the Act. Therefore, the amount of Rs. 4,25,000/- awarded by the Arbitrator to the claimant under Claim No. 13, is not sustainable and set-aside.

27. The Arbitrator has allowed 18% simple interest per annum, on the amounts awarded against Claims No. 2, 5, 7, 8 and 9 on the sum of Rs. 1,56,422/- from 6.2.2000 to 27.3.2000, as against

the claim of 24% per annum, of the claimant- contractor. The competency of the Arbitrator to award pre-suit interest has not been assailed. What was assailed was the rate of interest and the period. Section 31 of the Act provides 18% interest, per annum. The Arbitrator has allowed 18% interest per annum for 49 days only. The Arbitrator has found justification for awarding interest against Claims No. 2, 5, 7, 8 and 9. No reason has been shown how the rate of interest awarded by the Arbitrator is wrong and illegal. In my opinion, the pre-suit interest awarded by the Arbitrator under Claim No. 14(a) is justified and it does not require any interference. The issues No. 1 to 3 are answered accordingly.

28. The result of the above discussion is that the objections are partly allowed. The award dated 29.1.2003 to the extent of Rs. 4,74,964/- under claim No.10 and interest at the rate of 18% per annum on the amount awarded against claim Nos. 3, 5, 7, 8, 9, i.e., on a sum of Rs. 1,56,422/- from 6.2.2000 to 27.3.2000 under claim No. 14(a) is upheld and award of Rs. 4,25,000/- under claim No. 13 is set-aside. No costs.

August 1, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**